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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROY PEMBERTON,

Appellant,

vs.

JAMES A. DAVIS,

Appellee.

APPELLANT'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

FILED

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ARGUMENT

The Appellee's Answering Brief quotes extensively from the opinion of the District Judge in this matter and raises only one other contention, that is, that if Appellant, Pemberton, is entitled to any amount for storage charges, that amount is limited to a maximum of Two Hundred Fifty Dollars (\$250.00) by reason of the provisions of Section 1208.62 of the Code of Civil Procedure. In Pemberton's Opening Brief, we submitted arguments against the position taken by the District Judge which eliminated any allowance for storage of the aircraft, and we will not repeat the arguments there made. This Reply Brief will be limited solely to the effect of Section 1208.62,

I

SECTION 1208.62, CALIFORNIA CODE OF
CIVIL PROCEDURE DOES NOT LIMIT THE
LIEN CLAIM BY APPELLANT IN THIS PRO-
CEEDING.

As was previously stated, we know of no reported decisions in California construing Section 1208.61 of the California Code of Civil Procedure, the section which does grant lien rights against aircraft. The language of that Section is practically identical with the language of Section 3068(a), California Civil Code and the interpretations given to California Civil Code, Section 3068 would be determinative here; in construing a statute, other statutes in pari materia may be studied and reference can well be made to any other codes for clarification (In Re Porterfield, 28 Cal.2d 91, 168 P.2d 706; People v. Vasser, 207 Cal. App.2d 318, 24 Cal. Rptr. 481).

The statute granting the lien for repairs to an aircraft grants a lien dependent upon possession for the compensation to which the lien claimant is legally entitled, " . . . for making repairs, or performing labor upon and furnishing supplies or materials for, and for the storage, repair or safekeeping of any aircraft . . ." (Code of Civil Procedure, Section 1208.61); the statute limiting the lien rights, Section 1208.62 of the Code of Civil Procedure states:

"That portion of such lien in excess of two hundred

fifty dollars (\$250) for work or services rendered or performed at the request of any person other than the holder of the legal title is invalid, unless prior to commencing such work or service the person claiming the lien gives actual notice to the legal owner and the mortgagee, if any, of the aircraft, and the written consent of the legal owner and the mortgagee of the aircraft is obtained before such work or services are performed. . . ."

It is a principle of statutory construction that every sentence, phrase or word should be given effect (Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449). We submit that there is a distinction here in the language used by the legislators and that the limitation which appears in Section 1208.62, Code of Civil Procedure, that is, a limitation of \$250.00 for work or services rendered or performed, relates to that portion of Section 1208.61, California Code of Civil Procedure which grants the lien for making repairs or performing labor upon and furnishing supplies or materials for any aircraft. It is of some significance that the portion of Section 1208.61, California Code of Civil Procedure which grants a lien for storage, is stated as a separate clause in the statute, separated from the portion of the statute granting the lien for repairs or labor by the conjunction "and".

Additional weight for this interpretation exists when the language of Section 3068(b) of the California Civil Code is considered.

That Section reads in its entirety as follows:

"§3068(b): That portion of the lien in excess of two hundred dollars (\$200), for any work or services rendered or performed at the request of any person other than the holder of the legal title, is invalid, unless prior to commencing any such work or service the person claiming the lien gives actual notice in writing either by personal service or by registered letter addressed to the legal owner named in the registration certificate, and the consent of the holder of the legal title is obtained before any such work or services are performed. If any portion of a lien includes charges for the care, storage or safekeeping of, or for the rental of trailer parking space for a vehicle for a period in excess of 60 days, the portion of the lien which accrued after the expiration of such period is invalid unless the provisions of Section 10650(1) and 10652 of the Vehicle Code have been complied with by the holder of the lien."

A comparison of the respective lien statutes will show that the statute granting the liens with respect to aircraft (Code of Civil Procedure, Section 1208.61), is almost word for word the same as Civil Code, Section 2068(a) which grants a lien upon vehicles, and the section limiting the lien on aircraft (Code of Civil Procedure, Section 1208.62), is practically identical with the statute limiting

the lien on motor vehicles, the section just quoted above. The language used in each is the same, that is, the clause "work or services rendered or performed at the request of any person other than the holder of the legal title" (emphasis added). Then, Section 3068(b) goes on to impose an entirely different restriction for any portion of the claimed lien which covered services for care, storage or safekeeping of the vehicle. This limitation is not a monetary one but is based upon a period of storage of 60 days and it is of some significance to note that this limitation to 60 days storage is imposed only if the lien claimant has failed to comply with two sections of the Vehicle Code which require the lien claimant to maintain records of vehicle stored and to make a report to the sheriff's office or police department when a vehicle is stored for a period of time in excess of 30 days and the owner is unknown. No notice to a legal owner is required and it is apparent that the legislature treated the lien for storage on an entirely different basis than the lien for labor or materials.

We respectfully submit that consistent with the doctrine of statutory construction noted above, the intent of the legislators appears to have been to impose a limitation on the lien claimed for repair work or materials, with such limitation to be a monetary one, but that no such limitation exists with reference to any lien for storage. The attitude of the courts towards the sections limiting lien rights can perhaps be shown by reference to such decisions as Brown v. J. E. French Co., 253 Cal. App. 2d ___, 242 A. C. A. 70, 60 Cal. Rptr. 646, which was a direct holding that the provisions of

Section 3068(b) of the Civil Code which limited the amount of the lien, inured only to the benefit of the legal owner of the vehicle and held that the registered owner who had brought the car in for repairs must pay the entire repair bill even though the lien claimant had failed to comply with the notice provisions of Section 3068(b) of the Civil Code.

Accordingly, if the storage was properly authorized by the Sheriff of Kern County and if, as we contend in our Opening Brief, the Sheriff had the right to subject the aircraft to a lien for storage, then there is no limitation in amount such as is presently urged by Appellee, Davis.

CONCLUSION

It is respectfully submitted that the Appellant, Pemberton, is entitled to a lien for storage of the aircraft, such storage having been properly authorized and ordered by the Kern County Sheriff. Since the reasonable value of the storage is not in issue, then the order of the District Court should be reversed and the claim of Pemberton should be allowed in its entirety.

Respectfully submitted,

DEADRICH, BATES & LUND

By: KENNETH H. BATES

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Roy Pemberton

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Kenneth H. Bates

KENNETH H. BATES

BRIEF OF APPELLANTS

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

NO. 22322 ✓

MILDRED J. JACOBSON, BASIL D. JACOBSON, by MILDRED J. JACOBSON,
his next friend, and PRISCILLA J. JACOBSON, by MILDRED J.
JACOBSON, her next friend,

Appellants.

vs.

COLORADO FUEL AND IRON CORPORATION, a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

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STATEMENT

JURISDICTION

All plaintiffs are citizens of the State of Montana; defendant is a corporation foreign to the State of Montana, with principal place of business in the State of Colorado. The amount in controversy exceeds the sum of \$10,000.00, exclusive of interest and costs. R.A.223. The district court had jurisdiction by virtue of diversity of citizenship and amount in controversy. Art.III,Sec.2, Para.1,Const. of the U.S.; Title 28 U.S.C.,Sec.1332 (a) (1). See R.A.1,47 for pleadings.

This court now has jurisdiction by virtue of Title 28 U.S.C., Sec.1291, timely and appropriate notice of appeal having been duly given and filed. R.A.288, 235, 287.

STATEMENT OF THE CASE

DeRay Jacobson was killed October 1, 1964, when his head was crushed as the result of a piece of defendant's prestressed concrete strand breaking at a load at least 5,750 pounds less than the strength to which it is admittedly warranted. DeRay Jacobson's widow, son and daughter bring this action for damages sustained by reason of his death.

The steel strand which failed was 7/16 inch diameter Type 270 K seven-wire strand manufactured and sold by defendant, C.F. & I and was expressly warranted to have a "minimum ultimate strength" of 31,000 pounds, and to be capable of safely sustaining such load or stress. Ex. 1, 19; R.A.248-250, 48-59.

C.F. & I.'s Type 270 K strand is a highly specialized elastic cable-like strand made of seven uncoated, stress relieved, cold drawn, high tensile strength steel wires used in the manufacture of prestressed concrete objects. It is the subject of a Bulletin PC 955, prepared and distributed by C.F. & I. to the makers of prestressed concrete products, including United Prestress, Inc., DeRay Jacobson's employer. This bulletin is in evidence as Ex. 1, and is reproduced in the Record on Appeal. (R.A. 248-250) It was ". . . prepared to provide complete information on physical properties of the strand." Ex. 1. It points out that 270 K strand, ". . . an important engineering break through recently announced by C.F. & I. - Roebling . . . " has approximately 15 per cent greater strength than strand previously available. For 7/16 diameter strand the bulletin warrants in Table I:

Breaking Strength of Strand Min. 1b. 31,000

Table II referred to in the DESIGN LOAD paragraph warrants the 270 K strand to have:

Minimum Ultimate Strength 31,000#

To be used in prestressed concrete manufacture the strand must be placed in wedge grips, held by them and tensioned.

Ex. 1 assures the reader that:

Thorough testing has been conducted, using Type 270 K strand in wedge grips of the type employed in casting beds.

The failing hold down strand was used in a hold down device utilizing standard wedge grips. Ex. 23.

The copy of Ex. 1 in evidence contains personal handwritten notations of Floyd Swenson, the engineer at United Prestress, Inc. at the time DeRay Jacobson was killed. It was Swenson's sole source of information concerning the specifications and physical properties of 270 K strand. Tr. 64, 65, 85. Using the C.F. & I. bulletin as his guide, he designed the prestressed sections of a meat packing plant, including the two 90-foot single "T" roof beams on which DeRay Jacobson was killed. Swenson's work included calculation of the force, 22,500 pounds, to be imposed upon the hold down strand that failed. Ex. 7 b; Tr. 82, 151. In imposing the force on the 270 K hold down strand Swenson took C.F. & I. at its word. The bulletin, he testified, stated that the strand could be loaded to at least 31,000 pounds before failure. Tr. 82.

The load which Swenson calculated taking C.F. & I.'s claims for fact, was less than three-fourths of its claimed minimum breaking strength. Nothing he had ever heard or read led him to believe that this loading was unsafe. Tr. 64, 65, 82, 83, 85. He had after all allowed four and one-quarter tons of leeway.

To the force calculated by Swenson there must be added an allowance for the effects of friction in the prestressing system. This was done by plaintiffs' expert Dr. Arthur Anderson. He conservatively assumed 100% friction and full tensioning of the

strand and calculated the load on the strand at failure at not more than 23,250 pounds. Tr. 147 to 152. The defendant's expert thought it might be "two kips" (2,000 pounds) higher, which would give a load of 25,250 pounds. Tr. 440. All were agreed that the C.F. & I. strand failed at less than 31,000 pounds and the trial court so found. R.A. 228.

DeRay Jacobson, to the time of his death, was the foreman of a crew which made such things as roof beams and other members of prestressed concrete. His work was in the fabrication of these items, directing his crew in using 270 K strand, other reinforcing steel and concrete to manufacture the beams. He and his crew worked and took their direction from plans and measurements furnished to them by the design technician, Floyd Swenson. R.A. 231.

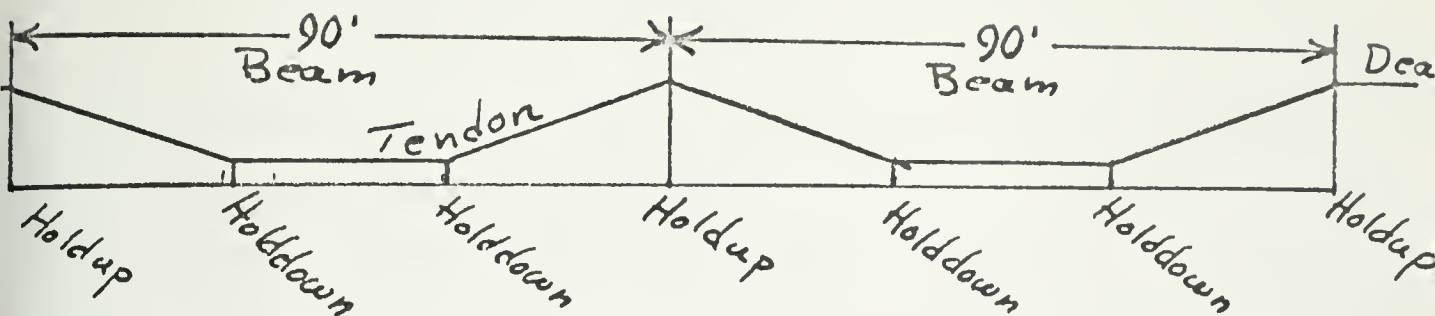
Before Mr. Jacobson and his crew could do the tensioning, design engineer Floyd Swenson had to figure out what was required by way of number of strands, pattern, and force to be applied. The designer takes into account the requirements of the building, the capacity of the strand, and the plant available to fabricate the beam. The building's requirements he determines from the architect's plans and specifications. The capacity of the strand he takes from the technical literature published by the manufacturer. The available plant he knows because he works there.

A prestressed beam is built in a "casting bed" by tensioning 270 K strand with heavy hydraulic equipment, then forcing

the tensioned strand into a downward bowed pattern for the purpose of later providing lifting force at the middle of the completed beam. After the strand has been fully tensioned and deflected, concrete is poured around it and retained until dry by a form in the shape of the prestressed concrete member desired. It is the tensioning operation prior to pouring concrete with which this case is concerned.

The casting bed used is slightly longer than 230 feet and was being used to make two 90-foot single T roof beams end to end. One end of the casting bed is firmly anchored in a fixed position. This is termed the dead end. The opposite end is mounted on hydraulic equipment and is movable. It is called the live end. Using the hydraulic machinery the live end is moved away from the dead end. This lengthens and tensions the horizontal prestressed concrete strands ("tendons") which are affixed to both the dead end and the live end.

When being used to cast the two 90-foot single T's the bed had three hold up points; one at the dead end where the strands were securely anchored, one in the middle through which the strands passed, and one near the live end. The hold up point in the middle was the separation between the two beams. The hold up points at the beam ends did not move, nor did the one in the middle. See sketch.



At the time of DeRay Jacobson's death 22 pieces of strand had been anchored at the dead end, threaded through the middle hold up point, and anchored at the live end. These strands were placed at pre-calculated levels in the casting bed at varying elevations above the floor of the bed. R.A. 224. Ex. 7 a.

The strand is tensioned by stretching the strand a pre-determined distance to achieve the pounds of stress required to do whatever job is to be done by the completed beam. The strand is first stretched horizontally by moving the live end a pre-determined distance, then deflected downward another pre-determined distance through the use of the hydraulic hold down device. 270 K strand such as is used in the horizontal tendons is also used as hold down strand to hold the horizontal tendons in the position to which they are deflected. The tendons and hold downs are under the greatest load when fully stretched to final position. The load on both horizontal strands and strands used to hold down the horizontal strands is related to the pre-determined distance that the strand is stretched or elongated. See Ex. 18, showing the relation between load and stretch.

Strand failures during the tensioning process are extremely hazardous. R.A. 231. "Lethal" is the term preferred by the

strand's developer, Mr. H. Kent Preston of C.F. & I. In his book, Practical Prestressed Concrete, McGraw-Hill Book Co., New York, Toronto, London, 1960 (Ex. 12) he states:

In addition to the normal precautions required on any construction work, it must be remembered that a prestressed concrete tendon under tension as high as 175,000 p.s.i. contains a tremendous amount of energy. The tendon and/or any equipment connected with it can whip across working areas with lethal results if its pent up energy is suddenly released by some type of equipment failure.

Mr. Preston is the head of the sales department at C.F. & I. He edited and supervised the writing of C.F. & I. Bulletin PC 955, Ex. 1. (Ex. 11, p. 60)

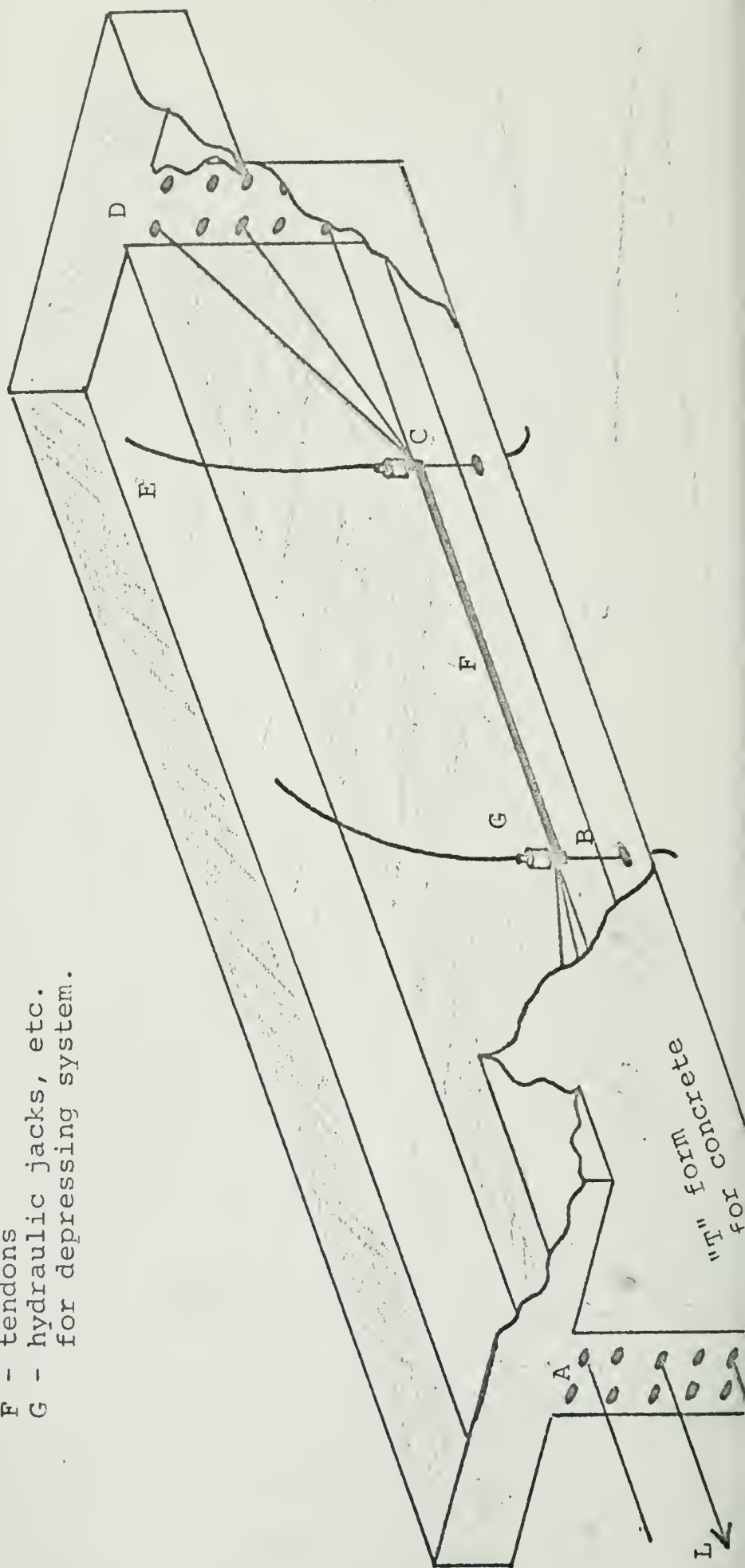
Those lethal forces were present in the 90-foot "T" beams being constructed when DeRay Jacobson was killed. These beams were part of a series of 90-foot T shape beams to be set edge to edge to form a roof for a meat packing plant. To span this distance the beams were designed with 22 tendons running the length of the beam. The 22 tendons were deflected downward at two hold down points within each beam. When in final position each of the 22 horizontal strands was tensioned to 21,700 pounds, or 70% of the minimum ultimate strength of the strand, the exact tension recommended by C.F. & I. in Ex. 1 for the most efficient and optimum performance in the completed beam. See Tr. 142, 143.

If fully deflected downward the total force on the horizontal tendons would have been $22 \times 21,700$ pounds, or a total of 477,000 pounds. In order to hold down the horizontal tendons under that

Cutaway view of interior arrangement of casting bed - strands are fully depressed. Scale is exaggerated.

Legend:

- L - live end
- A - hold up point
- B - hold down point
- C - hold down point
- D - hold up point
- E - hold down strand
- F - tendons
- G - hydraulic jacks, etc. for depressing system.



force, it was necessary to impose 22,500 pounds on the hold down strands at each hold down point. Ex. 7 a, 7 b; Tr. 151.

To apply the deflecting or depressing force after the lateral tension is set requires that two shorter pieces of 270 K strand be anchored at the bottom of the casting bed for each beam. On these two strands a set of hardware is placed, including a hydraulic jack. Ex. 23. The expansion of the jack acting with the hold down hardware forces the horizontal tendons down to the desired position. When the desired position is reached, the expendable part of the hardware, a standard wedge grip locks in place. The jack is removed and the concrete is poured. After the concrete hardens the forms are taken away and the ends of the strand trimmed off. This fixes for all time the tension and the pattern of the strand and the strand imparts its strength to the beam. The beam is then ready to be lifted off the casting bed, taken away for use, and the process starts over again.

Our illustration on the facing page shows in simplified fashion the position of the strand in each 90-foot T beam at the time the stressing is completed, but before the reusable portion of the hardware is removed and the concrete poured. In the illustration the live end and the dead end of the casting bed would be beyond the ends of the beam. A and D are hold up points, plates through which the horizontal tendons are threaded. B and C are hold down points utilizing the same 270 K strand.

On the date of Jacobson's death he and his crew were

utilizing the 230 foot casting bed to set up two of the 90-foot "T" beams end to end at the same time, and were using a common set of 22 horizontal tendons through both beams. Since each beam had two hold down points there were a total of four hold down points in the two beams. A common hold up point between the two beams was used. DeRay Jacobson and his crew anchored the 22 tendons at the dead end of the casting bed and ran them through the casting bed threading through the hold ups at varying elevations from the floor of the bed. Prior to anchoring them at the live end a small arbitrary amount of tension was placed upon them to straighten the strands. Then the individual strands were backed off in a measured amount. This was done by marking the individual strands at varying distances from the live end of the bed and allowing the strands to slip back to the marks. The straightening tension was then released. This was a necessary step because all strands in the T beam are forced in the deflection process a different distance to a point near the floor of the bed. (See illustration page 84). In the end product it is desired that each horizontal strand have an equal amount of stress, 21,700 pounds, and since the strands at greater distances from the floor will be stretched further than those closer to the floor the higher strands at the start of the deflection process must be longer from anchor to anchor than the lower ones.

The design in the instant case, as do most prestressed concrete designs, provided for two of the horizontal strands to

run straight through the beam and they were located in a low position so as not to be deflected with the other strands. Thus the desired tension was achieved on the straight strands where the live end was moved away from the dead end, and they were not affected by the deflection process. R.A. 224-225.

After adjusting the varying lengths of the individual horizontal tendons, they were gripped by the same standard wedge grips used in the hold down device and the entire live end was moved to a pre-calculated distance to produce an amount of tension which, when coupled with the tension created by the harping process would produce the total amount of tension in all of the strands which was called for by the design of the single T's. R.A. 225.

In the prestressing operation neither DeRay Jacobson nor his crew worked with pounds of force as such. That is the province of Floyd Swenson, the design engineer. On the casting bed things are done by measurement. To get the required force on the tendon the designer calculates the distance which the strand must be stretched. The same applies to the hold down force, the designer determined the number of inches of deflection or depression which would bring the tension to the desired level. This information was given to the crew foreman, DeRay Jacobson, and he used it to set up the job. Tr. 209-214. This system of measurement by elongation is the preferred way to accurately set up the tension and determine the load on the strand. (Preston's deposition, Ex. 11, p. 43).

In this case it was intended to depress the horizontal strands to a point near the floor of the bed at two hold down places in each of the 90-foot T's. At the start of the harping process the 22 horizontal tendons referred to above were stretched longitudinally through the length of the casting bed, and as noted each pair of longitudinal strands bore a different amount of tension than each other pair, depending upon their relative position from the floor of the casting bed.

DeRay Jacobson and his crew then applied a vertical force to these horizontal tendons at two points in each T to force all of the strands two points close to the floor of the casting bed. The vertical force was applied by two hydraulic rams which were operated from the top of the casting bed. The rams were operated together so that at any given time the points at which the strands were being affected by each ram would be the same distance from the floor of the casting bed. The rams had a five inch stroke so that after the strands were depressed five inches it was necessary to hold the strands in position while the piston of the ram was pulled back preparatory to a new thrust.

Part of the hold down device consisted of a saddle which is an inverted U made of steel plate, which gathers the strands together. Hold down strands were anchored to the beam plate at the floor of the casting bed by means of a supreme chuck, a standard wedge grip, and was threaded through the bottom of the form, through the saddle, through the bottom into a steel spacer

box open on one side, through another supreme chuck, out through the top of the box, through the ram and then through another chuck. For clarification see Ex. 23, a photo of the rig.

Through the interaction of these parts the horizontal tendons are deflected in increments down the hold down 270 K strands.

R.A. 225, 226.

The 22 horizontal tendons were fully deflected in the first of the single T beams by DeRay Jacobson's crew without incident. The crew was in the process of deflecting the 22 horizontal tendons at the remaining two hold down points in the second T beam. The horizontal tendon strands had reached a point within an inch or two of the floor of the casting bed when the workmen heard a noise accompanied by a slight movement. They shut off the jacks and investigated but found nothing out of the ordinary. They started the jacks for additional depression and heard another noise accompanied by slight movement. Tr. 218, 244, 247. The crew could not tell from the noise, the movement or observation just what had happened in the casting bed.

DeRay Jacobson, the foreman, was called and told what had happened. Jacobson sent a man under the bed to inspect the situation there. This inspection revealed nothing amiss. Jacobson and his men could see nothing out of the ordinary looking into the casting bed from the top. Jacobson then ordered the crew to turn the jack on and turn it off. Tr. 231, 232. The jack was turned on briefly "and everything seemed all right".



Tr. 248. Nothing happened. The jack was again turned on, the hold down strand broke, and the whole thing "blew up".

The tension on the 22 horizontal tendons was instantly released and they flew upward as would a bow string. The loosed pentup energy in the system threw the jacks and hold down iron and steel high in the air. DeRay Jacobson was hit by some of the flying iron and steel and received the injuries from which he died. R.A. 225, 227; Tr. 248, 249.

DeRay Jacobson was not contributorily negligent. R.A. 232, 234. (Finding XVI, Conclusions of Law VIII).

Subsequent investigation revealed that the initial failure of the strand occurred at the point where the uppermost wedge grip met the milled upper surface of the portable hydraulic jack used to furnish the depressing force. See Ex. 23 and Ex. 4, p. 6. When the first hold down strand failed, the entire load was violently thrown onto the other hold down strand which was jerked in two. Thus all of the depressed tendons were released to fly up, hurl hardware in all directions and oscillate up and down with tremendous speed and force.

At the point of failure there were nicks on three of the wires spaced uniformly around the strand from the wedge grips. Tr. 356-362, 408. There is of course no way that 270 K strand can be utilized without the "wedge grips of the type employed in casting beds" to which C.F. & I.'s literature refers. Ex. 1; Tr. The nicking is immaterial in view of the fact that C.F. & I.

stated warranties of 31,000 pound minimum ultimate strength and minimum breaking strength in the context of use in the manufacture of prestressed concrete objects and with wedge grips of the type normally employed. Ex. 1. After all this is what C.F. & I. makes it for.

Nevertheless nicking does not account for the failure of the strand at the 23,250 pounds of stress or less imposed upon it at failure according to plaintiffs' expert Dr. Arthur Anderson. (Tr. 158, 172), or even at the load of 25,250 pounds which the defendant's expert Mr. Janney thought possible. The defendant's metallurgical expert, Mr. Teleshak, testified at some length concerning the grip marks from the wedge grips which were necessarily used in the employment of the strand. According to Mr. Teleshak, at the point of initial failure three wires of the seven wire strand, located at approximately uniform 120 degree intervals exhibited nicks from the wedge grip. Tr. 256-362, 408. In an original report prepared for C.F. & I. (Ex. 4) Mr. Teleshak concluded that the load carrying strength of the three nicked wires was reduced about 10%. Tr. 379. Subsequently, after communication with Mr. Preston of C.F. & I., he wrote a "supplemental" report (Ex. 6), indicating that the nicks affected the overall load carrying capacity of the strand 10%, as opposed to 10% of the three nicked wires. Tr. 382-382. If Mr. Teleshak's conclusion is accepted from his first report, the nicking reduced the load carrying capacity of the 270 K strand to approximately 29,175

pounds. Either of these figures are well above the amount of force which was actually imposed upon the strand at the time it failed. The nicking does not account for the failure. Tr. 369-379, 397-402.

The trial court found that C.F. & I. knew that its 270 K strand would be used for hold down devices, although the strand was not furnished specifically for that use; that 270 K strand was to be employed under heavy tension and prestressing operations; that strand failures are extremely hazardous; that a single strand of 270 K should not be used in hold down devices where tensions of more than 15,500 pounds are developed; and that defendant's literature did not adequately state the limitation of 270 K strand when used as a hold down device. R.A. 231; Ex. 1. In reliance on that inadequate literature Floyd Swenson designed in the hold down load that proved fatal to DeRay Jacobson.

No one has ever asserted that the strand even approached the 31,000 pound minimum breaking strength claimed for it before it failed. No one has ever asserted that Floyd Swenson knew that the load which he designed was not safe. No one warned Mr. Swenson or anyone else at United Prestress of any special hazard involved in using the strand to retain the hold down device. C.F. & I. was familiar with the United Prestress system, having observed the hold down technique through its agents. No one from C.F. & I. ever criticized the system or apparatus used by United Prestress for depressing the strand.

The case was tried to the District Court sitting without a jury. On the theory of negligence the trial court found that another engineer at United Prestress, Albert Young, knew that two strands, or a strand larger than 7/16", should have been used in the operation in question and that one strand should not be used where the tension exceeded 18,000 pounds. The trial court held that the knowledge of Mr. Young, an engineer in no way connected with DeRay Jacobson's death, "insulated" C.F. & I. from liability for failure to warn of the known limitations of the strand.

With respect to express warranties the trial court held that the strong unequivocal language of Ex. 1 representing 270 K strand to have a minimum ultimate strength of 31,000 pounds did not constitute an express warranty. No finding was made concerning whether C.F. & I.'s statement that the strand had a minimum breaking strength of 31,000 pounds was an express warranty.

R.A. 231-233.

The trial court made no findings of fact or conclusions of law with respect to the plaintiffs' theories of liability for breach of implied warranties and strict liability in tort, as declared by Sec. 402 A, Restatement of the Law Torts, Second.

In accordance with the court's Findings of Fact and Conclusions of Law, judgment was entered denying all relief to DeRay Jacobson's family.

By timely motion the Jacobsons moved the court for an order

amending its Findings of Fact and Conclusions of Law and amending the judgment or in the alternative granting the plaintiffs a new trial on all or part of the issues involved in the action. The trial court denied the motions. The Jacobsons filed timely notice of appeal from the judgment of the District Court entered against them and the order of the District Court denying their motions under Rules 52, 59 and 60, Federal Rules of Civil Procedure.

R.A. 288.

SPECIFICATIONS OF ERROR

I.

The District Court Finding of Fact XIII and Conclusions of Law V, VI and VII are clearly in error in invoking the knowledge of the wrong man, Mr. Young, to relieve C. F. & I. of liability.

- (a) Albert Young had nothing to do with DeRay Jacobson's death.
- (b) The District Court Finding of Fact XIV established defendant as at least a joint tort feasor liable to the plaintiffs under Montana law.
- (c) Defendant had the burden to prove independent intervening cause, but did not do so.
- (d) Mr. Swenson decided the force to be put upon the hold down device, a piece of equipment with which he was fully familiar.

II.

The District Court erred in its application of the law of "duty to warn" in Conclusions of Law V and VI.

- (a) The duty ran to Mr. Jacobson.
- (b) The duty required the warning to be given to Mr. Swenson so that he could design within safe limits.
- (c) The risk of ingnorance of the designer must be imposed upon C. F. & I., not upon Mr. Jacobson.

III.

The District Court erred in failing to hold defendant liable for breach of express warranties stated in its sales literature and admitted in its pleadings.

- (a) Finding of Fact XII and Conclusion of Law III wherein the District Court found defendant did not warrant 270 K strand would withstand a tension of 31,000 pounds when employed as hold down strand by United Prestress in its prestressing operation are unsupported by the evidence, contrary to the evidence and clearly erroneous.

IV.

The District Court erred in failing to rule upon plaintiffs' theories of breach of implied warranties and strict liability in tort, and in failing to hold defendant liable for breach of implied warranties or under the law of strict liability in tort.

V.

The District Court's failure to grant plaintiffs' Motion for New Trial on all or part of the issues was an abuse of discretion.

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V.

The District Court's failure to grant plaintiffs' Motion for New Trial on all or part of the issues was an abuse of discretion.

ARGUMENT

THE TRIAL COURT ERRED IN HOLDING C.F.& I. "INSULATED" FROM LIABILITY BY REASON OF KNOWLEDGE ATTRIBUTED TO ALBERT YOUNG, AN ENGINEER IN NO WAY CONNECTED WITH THE DEATH OF DeRAY JACOBSON.

(1) The record clearly establishes that Floyd Swenson was the only engineer involved in the death of DeRay Jacobson and that Albert Young had nothing to do with this tragedy.

At the time of DeRay Jacobson's death, Floyd Swenson was employed by United Prestress, Inc. as an engineer. He and he alone engineered and designed the prestressed sections for the Pierce Packing Company project, on which DeRay Jacobson was working when killed by the failure of C.F.& I. strand. Tr. 63,67. Swenson calculated the force to be imposed upon the hold down strands in the hold down device in use at United Prestress. Ex. 7 b; Tr. 82, 151. In doing so he relied exclusively on C.F.& I. Bulletin PC 955 (Ex. 1) for the specifications and physical properties of 270 K strand. It was the only information available to him when he designed the prestressed members and calculated the hold down forces. Tr. 64, 65.

Floyd Swenson is no longer with DeRay Jacobson's employer United Prestress, Inc. Albert Young who is presently the engineer and chief technical person at United Prestress, Inc. had absolutely nothing to do with the death of DeRay Jacobson. At the time of Jacobson's death, Young was merely a production coordinator who took care of the office records and entered into sales and engineering only in part and to a small degree. Tr. 5. Concerning the project involved in Jacobson's death Young testified:

Q: Mr. Young, were you the engineer in charge of the job on which Mr. Jacobson was killed?

A: No, I wasn't.

No one testified to the contrary and in the trial court it never occurred to C.F. & I. to urge that Young had anything to do with DeRay Jacobson's death or the engineering connected with it.

The trial court however erroneously described Young as the superintendent of the plant and the chief technician" and ascribed to him the knowledge that "two strands, or a strand larger than 7/16" should have been used in the operation in question and that one strand should not be used where the tension exceeded 18,000 pounds. The court found that C.F. & I.'s literature did not contain adequate warnings as to the limitations of 270 K strand when used as a hold down device, but by reason of the knowledge attributed to Young such failure did not make C.F. & I. liable in this case, citing Hopkins v.

E. I. DuPont deNemours & Co., 3 Cir 1954, 212 F.2d 623, Cert.Den. 48 US 872. The confusion of Young with Swenson, the only engineer having anything to do with the project, renders the Jacobson family victims of a substantial injustice.

It was clearly erroneous to apply Hopkins v. E. I. DuPont deNemours & Co. to the facts of this case. In Hopkins the plaintiff was denied relief because the foreman in charge of drilling holes and placing dynamite had been informed that drilling in hard rock produced sufficient heat to cause premature explosion of dynamite and knew that certain temperatures would

be too hot for the safe handling of a blasting charge.
Assuming that Albert Young had knowledge of the limitations of
C.F. & I.'s product which C.F. & I. neglected to publish, the
Hopkins case would be similar only if Young did the engineering
connected with the death of DeRay Jacobson. But Floyd Swenson
occupies the position of the foreman in the Hopkins case;
and the record is clear that Floyd Swenson knew nothing of
the limitations of the 270 K strand beyond those set forth in
the overstated literature of the defendant which the trial court
found did not adequately warn of those limitations.

Swenson's lack of knowledge is adequately demonstrated by
the record. He testified:

Q: I show you what have been received in evidence as
plaintiffs' exhibits 1 and 2 and ask you to look at those,
please.

Do you recognize either of these exhibits?

A: I recognize No. 1.

Q: Would you tell us what that is, please?

A: This gives the specifications and physical properties
of 270 K strand.

Q: Was that available to you when you were working for the
United Prestress on October 1, 1964 and prior thereto?

A: Yes sir.

Q: Was the other exhibit, Plaintiffs' 2, available to
you at that time?

A: I don't recognize this one.

Q: I notice here there are some pencil markings and
things inside Plaintiffs' No. 1. Do you recognize what
they are, not what they mean?

A: Yes sir.

Q: And what are they?

A: They are numbers I used in designing.

Q: That is your handwriting?

A: Yes sir.

Q: Then is this Plaintiffs' Exhibit No. 1, was that a source of your information concerning the strength characteristics of Colorado Fuel and Iron Type 270 K strand, prestress concrete strand, 7/16ths inch diameter?

A: Yes.

Q: Did you have any other information from Colorado Fuel and Iron Company concerning the strength characteristics of the strand, other than this material?

A: Not that I recall.
Tr. 64-65

* * *

Q: So this was your first employment, was it not, in the fabrication of prestress concrete members, is that correct?

A: Right.

Q: And prior to October 1, 1965, had you ever designed a member exactly like the one you were designing?

A: Would you define 'exactly'?

Q: Well - -

A: - - exactly the same dimensions?

Q: Exactly the same dimensions.

A: No sir.

Q: Same length in the leg and depth of a leg and so forth?

A: No sir.

Q: Had you ever designed an identical member?

A: Within my interpretation of identical, I think I could say yes.

Q: Well, let's see if our interpretations are similar. Same dimensions as this one, with the same number of strands and with the same depths in the leg.

A: No sir, not with all three of those combined.

Q: As a matter of fact, then, this was the first such member that you had designed, isn't that right?

A: Yes sir.
Tr. 79-80.

* * *

A: The ultimate capacity of the strand is the maximum load we can put on the strand before failure.

Q: And that's 31,000 pounds?

A: 31,000 minimum, correct.

Q: And the recommended initial tension, which is the total tension which you should have on this thing is recommended at 70% of its ultimate strength, is it not?

A: It doesn't say recommended.

Q: Do you understand that it's not recommended to be used at 70% of its ultimate strength?

A: No sir, I don't.

Q: Would you use it now at more than 70% of its ultimate strength?

A: If I didn't feel it was dangerous, yes.

Q: Do you feel now it would be dangerous to use 70% -- more than 70% of its ultimate strength?

A: I didn't feel that the extra load was significant.

Q: Did you design the hold down device in this particular case?

A: No sir.

Q: Were you very well familiar with the hold down device?

A: Quite well.
Tr. 82-83

Q: Did you ever seek any other information with respect to 270 K prestress concrete strand from C.F. & I., or any other company?

A: No sir.

Q: You relied solely upon this brochure, is that correct?

A: Correct.

Q: Do you know whether there is a substantial amount of literature written about 270 K strand or other types of prestress concrete strand?

A: By brand name?

Q: Not necessarily by brand name but I will start first with a brand name.

A: I don't know of anything else that would mention C.F. & I. strand, no. Tr. 85

* * *

Q: During the period of time that you were employed by United Prestress Concrete, did you have any other hold down strand breaking?

A: Not that I recall.
Tr. 86 (Emphasis added)

Mr. Swenson is thus proved to have been without the knowledge of safety limits which might insulate C.F. & I. As the trial court found, the safety information is not made available in defendant's exaggerated literature. (R.A. 232) An example of general literature is an authoritative book on the subject of strand by Mr. Preston (of C.F. & I.) the developer of 270 K strand which describes its dangerous character but is silent on safety factors

r load limitations. Ex. 12. It is not at all surprising
herefore that Swenson was without knowledge of safety limits
concerning C.F. & I.'s 270 K strand -- "an engineering breakthrough",
x. 1.

On the facts of this case Montesano v. Patton Scaffolding
Company, WD Pa., 1962, 213 F.Supp. 141 is more nearly applicable
than the Hopkins decision relied on by the trial court. In
Montesano the plaintiffs' decedent was killed when a bracket
supporting a scaffolding gave way. The bracket was manufactured
by the defendant and rented by it to Cost Brothers, the employer
of plaintiffs' decedent. The defendant urged that Cost Brothers
knew of the bracket's dangerous design and by reason thereof
the defendant was "insulated" from liability for the death
of the plaintiffs' decedent. The court disposed of this
contention in the following language:

The defendant contends that merely giving the knowledge
to Cost or Cost's actual knowledge would be sufficient
to insulate it from liability in this case. The effec-
tive warning given to third persons is discussed in
Comment (1) to the Restatement of the Law of Torts,
Section 388. The comments contained therein clearly
show that a supplier of chattels where the risk of harm
to the actual user of the chattel, Montesano in this case,
is great then the supplier is required to go further than
merely tell the lessee of the chattel such as Cost of the
dangerous character of the article. If he fails to exercise
reasonable care under the circumstances, if the information
is not brought home to those whom the supplier expects to
use the chattel, he is subject to liability.
(Emphasis added). 213 F.Supp. at 143.

Lloyd Swenson and DeRay Jacobson were the users of C.F. & I.'s

product -- not Albert Young. It was the design engineer, Floyd Swenson, along with DeRay Jacobson, who was expected to use the hattel and to whom under the circumstances of this case the warning should have been given if C.F. & I. is to be insulated from liability.

The error urged here was pointed out to the trial court on motion for a new trial. (See R.A.239-286). The trial court responded with this language in its order denying the most trial motion:

Plaintiffs, in their arguments, expressed the idea that Swenson designed the members in question and that it is to his knowledge that the court should look rather than to the knowledge of the witness Young. Swenson did design the member in question, but the record does not indicate that he had anything to do with the design or use of the hold down device which failed. It was not the design of the member, but rather the design and use of the hold down device that caused the trouble. The hold down device was one which had been used long prior to the employment of Swenson. (Emphasis added). R.A.287.

The distinction made by the trial court between design of the member and design and use of the hold down device is erroneous and contrary to the record.

Swenson did his designing with reference to the prestressing equipment in use at United Prestress -- he was not away in an ivory tower making abstract designs, but was a part and parcel of the United Prestress construction process. While he did not actually design the hold down device in use he was in fact "quite well familiar with the hold down device". Tr. 83. Swenson's design work was not limited to forming the members but included

calculation of forces to be imposed on the hold down strands
on the hold down device with which he testified he was "quite
familiar". He did in fact design, calculate and order imposed
upon the hold down strands the force that was placed upon them
in the prestressing operation. Ex. 7 b; Tr. 82,151. Swenson's
design and calculations were based on information he obtained
from the C.F. & I. bulletin. Ex. 1. These forces, so calculated
were imposed upon the actual piece of C.F. & I. strand which
failed and killed Jacobson.

Swenson was aware of the forces he was imposing upon the
hold down strands. Because of the representations contained in
the C.F. & I. literature extolling the strength of the strand
he "didn't feel that the extra load was significant". Tr. 83

In contrast Albert Young had absolutely nothing to do
with the use of the hold down device when Jacobson was killed.
He was wholly unconnected with design, calculation or imposition
of the forces involved on the hold down strands which failed
and killed DeRay Jacobson. Further, even at the time of trial
Young was not familiar with some details of the hold down device. See
Tr. 49

The trial court's confusion of Albert Young with the role
played by Floyd Swenson, the only engineer connected with this
tragedy, was manifest factual error imposing a wholly unjust result
upon DeRay Jacobson's family.

Further, it was demonstrated on Motion for New Trial that

Albert Young had no special knowledge concerning C.F. & I's 270 K strand. The only information he actually had concerning the strand, strength and specifications is that contained in Ex. 1, the literature which the trial court held "did not adequately state the limitation of 270 K strand when used as a hold down device" and "did not contain adequate warnings". R.A. 245, 231, 232. Young merely adopted his own arbitrary standard within the 31,000 pound limitation represented by C.F. & I. He said merely:

I have arbitrarily drawn a line at 18,000.
Tr. 38

Albert Young therefore merely adopted a standard within the limitations of the defendant's product stated in its literature. Floyd Swenson, the engineer actually connected with DeRay Jacobson's death, adopted another standard, still well within the limitations of the defendant's product as stated in its literature. Under the trial court's decision the Jacobson family is penalized because Mr. Swenson did not know or apply Mr. Young's personal standard. C.F. & I., a tortfeasor found by the trial court to have failed to adequately warn of the limitations of its strand, is rewarded by this penalty.

2) Assuming arguendo that Albert Young had some connection with DeRay Jacobson's death and knowledge of the unexpressed limitations of 270 K strand, C.F. & I. is severally liable as a joint tortfeasor under controlling Montana law.

Since Erie R.Co. v. Thompkins, 308 U.S. 64, 58 S.Ct. 817, 122 L. ed. 1188, 114 A.L.R. 1487 (1938) it has been axiomatic that

federal district courts must follow the law of the states in which they sit when deciding cases of this nature. It is the law of Montana that more than one person may be liable for causing injury; and C.F. & I. is liable for its negligence which caused the death of DeRay Jacobson, regardless of any concurrent negligence, knowledge, acts or failures of Albert Young. The trial court's decision that C.F. & I. was "insulated" from liability by the knowledge of Albert Young is contrary to Montana law.

Negligence on the part of C.F. & I. is established by the findings and decisions of the trial court:

The defendant knew that its 270 K strand would be used for hold down devices although the strand was not furnished specifically for that use. The defendant knew that 270 K strand was employed under heavy tension in prestressing operations, and that strand failures are extremely hazardous. The defendant knew that a single strand of 270 K should not be used in hold down devices where tensions of more than 15,500 pounds are developed. Defendant's literature did not adequately state the limitation of 270 K strand when used as a hold down device.

The defendant's literature did not contain adequate warnings as to the limitations of 270 K strand when used as a hold down device,....
R.A.232.

Accordingly the trial court found C.F. & I. negligent for breach of the duty to warn. In addition to the American Law Institute Section 388 of the Restatement of the Law, Torts, Second, relied on by the trial court, the duty to warn was imposed on C.F. & I. by Hopkins v. Ravalli County Electric Co-op., Inc., 44 Mont. 161, 395 P.2d 106 (1964) and Section 58-607 Revised Codes of Montana, 1947, as amended.

In Hopkins v. Ravalli County Electric Co-op, Inc., supra, the Supreme Court of Montana held appellant liable for negligence in failing to warn the respondent of poisonous weed spray which killed respondent's cattle. The court said:

These facts above point out two important things to this court:

(1) That appellant had KNOWLEDGE of the nature of the poisonous substance and its danger to animals;

(2) That with this knowledge, appellant failed to give NOTICE to respondent, an adjoining landowner. Thus we conclude in this particular case, under these particular facts, that appellant's ownership of the land upon which the poison was sprayed is immaterial, that there was an implied invitation to respondent, from the continuous usage for years by respondent of the strip of land as pasture, and that, therefore, appellant owed a duty to respondent to warn of the poisonous spray, especially where appellant had knowledge of the nature of the spray and the dangers it presented. We hold that the jury and judge in the lower court were justified under the facts of this particular case in finding a breach of the duty to warn, and thus finding appellant guilty of negligence.

(See R.C.M. 1947, §58-607, which says, 'Everyone is responsible, not only for the result of his wilfull acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, wilfully, or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the title on compensatory relief.') (Emphasis added except at the words 'KNOWLEDGE' and 'NOTICE' which the court emphasized) 144 Mont at 166-167, 395 P.2d at 108,9.

Comparing the two facts there emphasized by the Montana Supreme Court with the Findings and Conclusions in this case makes it clear that C.F. & I. was guilty of negligence.

C.F. & I. with knowledge of the use, nature, limitations and danger of its product failed to notify anyone of these matters.

The trial court found negligence, but even if it had not the evidence clearly established C.F. & I.'s negligence. C.F. & I. not only failed to give warning of known dangers but published Bulletin PC 955 (Ex.1) giving information misleading and inconsistent with the known limitations of the strand. C.F. & I. well knew the manner in which its strand was used at United Prestress having observed the hold down technique through several of its agents. Tr. 28,66,104,105. These opportunities to give warnings were never taken; the hold down procedure was never criticized.

In Montana negligence is:

...a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns. Section 19-103, R.C.M. 1947, as amended.

Negligence, as applied to acts of omission, is the failure to do what a reasonable and prudent person would ordinarily have done in the circumstances of the situation. In re Mullen's Estate, 97 Mont. 144, 33 P.2d 270, 272 (1934) Ahlquist v. Mulvaney Realty Co., 116 Mont. 6,23,152 P.2d 137, (1944).

As noted by the Montana Supreme Court in Hopkins v. Ravalli County Electric Co-op, Inc., supra, Section 58-607 of the Revised Codes of Montana 1947, makes everyone responsible for an injury occasioned to another by want of ordinary care or skill in the management of property or person.

Having found C.F. & I. negligent, Montana law did not permit the trial court to relieve C.F. & I. of liability for its negligence if that negligence was either the proximate cause or one of the



concurring proximate causes of DeRay Jacobson's death.

proximate cause is established by the testimony of Floyd Swenson quoted above. His statement demonstrates that the inadequacies and boasts in C.F. & I.'s Bulletin PC 955 (Ex.1) killed DeRay Jacobson.

For the convenience of the court a portion of his testimony is again reproduced:

Q: I show you what have been received in evidence as plaintiffs' exhibits 1 and 2 and ask you to look at those, please. Do you recognize either of these exhibits?

A: I recognize No. 1.

Q: Would you tell us what that is, please?

A: This gives the specifications and physical properties of 270 K Strand.

Q: Was that available to you when you were working for the United Prestress on October 1, 1964 and prior thereto?

A: Yes sir.

Q: Was the other exhibit, Plaintiffs' 2, available to you at that time?

A: I don't recognize this one.

Q: I notice here there are some pencil markings and things inside Plaintiffs' No. 1. Do you recognize what they are, not what they mean?

A: Yes sir.

Q: And what are they?

A: They are numbers I used in designing.

Q: That is your handwriting?

A: Yes sir.

Q: Then is this Plaintiffs' Exhibit No. 1, was that a source of your information concerning the strength characteristics of Colorado Fuel and Iron Type 270 K strand, prestress concrete strand, 7/16ths inch diameter?

A: Yes.

Q: Did you have any other information from Colorado Fuel and Iron Company concerning the strength characteristics of the strand, other than this material?

A: Not that I recall.
Tr. 64-65

* * *

Q: Did you ever seek any other information with respect to 270 K prestress concrete strand from C.F. & I., or any other company?

A: No sir.

Q: You relied solely upon this brochure, is that correct?

A: Correct.

Q: Do you know whether there is a substantial amount of literature written about 270 K strand or other types of prestress concrete strand?

A: By brand name.

Q: Not necessarily by brand name but I will start first with a brand name.

A: I don't know of anything else that would mention C.F. & I. strand, no. Tr. 85
(Emphasis added)

It is clear from Mr. Swenson's testimony that had C.F. & I. either given an adequate warning as to the limitation of 270 K strand or refrained from making the misrepresentations concerning its strength contained in the bulletin that DeRay Jacobson would not have been killed. The negligence of C.F. & I. was a proximate

cause of the strand failure resulting in the injuries and death of DeRay Jacobson. The proximate cause of an injury is defined in Montana law as:

That cause which in a natural and continuous sequence, unbroken by any new and independent cause, produces the injury, and without which it would not have occurred. McNair v. Berger, 92 Mont. 441, 15 P.2d 834 (1932)

That quotation states the law as repeatedly announced by the Supreme Court of Montana. Wallace v. Chicago M. & St.P.Ry.Co., 8 Mont. 427, 138 Pac. 499 (1914); Kirby v. Oregon Shortline R.R. Co., 59 Mont. 425, 197 Pac. 254 (1920).

The Montana law of proximate cause points to C.F.& I., but it excludes Albert Young who was not in the chain of events leading to the death of DeRay Jacobson. However even if we assume as the court did that Albert Young knew the limitations of C.F.& I. strand and that knowledge, or some other act or omission on his part, contributed in some way to Jacobson's death, Montana law does not permit C.F.& I. to be relieved of liability. The negligence of C.F.& I. was clearly a concurring cause of Jacobson's death. C.F.& I. was at least a joint tortfeasor, and any act or omission of Albert Young be it innocent, tortious or criminal, is not sufficient to relieve C.F.& I. from liability. Restatement of the Law, Torts, Second, §439.

In Lake v. Emigh, 121 Mont. 87, 190 P.2d 550 (1948) the applicable rule was stated by the Supreme Court of Montana as follows:

Where several causes producing an injury are concurrent and each is an efficient cause without which the injury would not have happened, the injury may be attributed to all or any of the causes, and recovery may be had against either or all of the responsible persons although one of them was more culpable and the duty owed them to the injured person was not the same. (Emphasis added).

That law is so well settled in Montana that it is the source of a standard jury instruction in the Montana Jury Instruction Guide. Montana Jury Instruction No. 12.01 reads:

More than one person may be responsible for causing injury. If you find that the defendant was negligent and that his negligence proximately caused injuries to the plaintiff it is not a defense that some third person may also have been negligent.

As recently as July of 1967, the Montana Supreme Court reaffirmed that rule. In Benner v. B. F. Goodrich Co., 4 St.Rep. 617, 621, the court quoted an earlier decision with approval (Black v. Martin, 88 Mont. 256, 265, 292 Pac. 577) as follows:

If the concurrent negligence of two or more persons causes an injury to a third person, they are jointly and severally liable, and the injured person may sue them jointly or severally and recover against one or all.

That principle, violated by the trial court's decision, is also recognized in the American Law Institute's Restatement of the Law of Torts, Second:

§439. Effect of Contributing Acts of Third Persons
When Actor's Negligence is Actively Operating.

If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious, or criminal act is also a substantial factor

§442 A. Intervening Force Risked by Actor's Conduct.

Where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause.

§442 B. Intervening Force Causing Same Harm as That Risked by Actor's Conduct

Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.

Within Restatement terminology C.F. & I.'s negligence as an "active and substantial factor" in bringing about the death of DeRay Jacobson. Whether or not anything done or omitted by Mr. Young influenced the death of Mr. Jacobson, the liability of C.F. & I. is not affected. It remains liable at least as a joint tortfeasor.

Under these rules and the controlling Montana decisions, the trial court's Finding of Fact XIV (R.A. 231) compels entry of judgment for the plaintiffs against the defendant.

PLAINTIFFS HAVE NO BURDEN TO DISPROVE INDEPENDENT INTERVENING CAUSE.

"Insulation" from liability, if there is such a thing, has never been recognized in the Montana law. If the term refers to "independent intervening cause", and from the context of its use we assume it does, then the court erred in invoking it.

By the court:

. . . the court is of the opinion that Young had this knowledge prior to the accident, but if he did not then the plaintiffs failed to sustain their burden of proving a lack of knowledge. (R.A. 231)

* * *

The defendant's literature did not contain adequate warnings . . . but by reason of the knowledge the United Prestress technicians had of such limitations such failure does not make defendant liable in this case. (R.A. 232, 233)

* * *

. . . it is sufficient to insulate the supplier from liability for failure to warn if the warnings given are sufficient to apprise the engineers or technicians of the dangers involved, or if the technicians have knowledge of the dangers involved. (R.A. 233)

What the court did is impose a burden on defendant to disprove the guilt of Mr. Young. Besides being immaterial because of the joint tortfeasor rules, this imposes the defendant's burden upon plaintiffs.

Independent intervening cause may be a legal defense, if it exists in a case. But defendant must affirmatively prove its existence by a preponderance of the evidence. Doubt on the issue must be resolved in favor of plaintiffs.



Sec. 433 B. Burden of Proof.

(1) Except as stated in subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiffs is upon the plaintiffs.

(2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiffs, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

(3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm. (Emphasis added)

See also 65 A C.J.S., Negligence, Section 209 p. 482,

and cases cited at note 32 therein.

The court was in substantial doubt, it is implicit in the way it dealt with the possibility of Young's knowledge. (R.S. 231) It places the burden upon plaintiffs to prove the negative, that Young did not have some knowledge upon which C.F. & I. might rely. This is out of harmony with the Montana evidence statute which generally requires proof only of the affirmative 93-401-26, R.C.M., 1947.

Despite the fact that they had no duty to do so, plaintiffs went quite a long way in their evidence on this issue. Sole responsibility for the design and force was Swenson's. (Tr. 63, 67) Mr. Young is the "chief" (and only) technical person now. But he was not in 1967.

A. At the time of this incident, I was what is more commonly referred to as a production coordinator, take care of the office records, so to speak, and in part did enter into sales and engineering to a small degree. I think that pretty well covers it. (Testimony of Albert Young, Tr. 5)

As a witness his testimony was that of an informed observer, not a participant. His presence and his acts or omissions, whatever they may be, were collateral to the casual chain leading to Mr. Jacobson's death.

What more should plaintiffs prove? Fairly defendant should come forward with evidence if it seeks exoneration because of an intervening circumstance.

ASSUMING THE FACTS AS FOUND BY THE COURT, AND THE RULE OF LAW IT ADOPTED, THE COURT REACHED THE WRONG RESULT.

The trial court adopted Section 388 Restatement, Torts, Second, as the law of Montana in the absence of controlling decisions of our supreme court. We do not quarrel with this. But the court did not follow through and properly apply it to the facts as the court found them in this case. Under this rule, on such facts, C.F. & I. owed to Mr. Jacobson a duty to furnish him the information he needed to safely work with 270 K strand. C.F. & I. failed to do this.

The Restatement section reads:

Sec. 388. Chattel Known to be Dangerous for Intended Use.

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous. (Emphasis added)

(1) The duty imposed upon C.F. & I. runs to Mr. Jacobson as the actual physical user of the strand.

The comment of the editors makes this quite clear. The

first paragraph of the comment emphasizes this point:

The words 'those whom the supplier should expect to use the chattel' and the words 'a person for whose use it is supplied' include not only the person to whom the chattel is turned over by the supplier but also all those who are members of a class whom the supplier should expect to use it or share in its use with the consent of such person, irrespective of whether the supplier has any particular person in mind.

Yet, the trial court, after adopting the Restatement as the rule of decision turned around and said:

There is no duty to warn those who simply follow the directions of the engineers or technicians . . .
(by the court, R.A. 233)

There is no way to reconcile the court's statement with the clear meaning of the Restatement. Nor can it be reconciled with the basic reason, need to know, underlying the duty to warn. The man handling 270 K strand needs to know how far he can safely stress it without being exposed to the hazards of breaking, flying iron and steel.

Warning was absolutely essential to safe use of defendant's strand. In use for hold downs the strand is very dangerous, the court so found. It also found that C.F. & I. knew how United Prestress was using 270 K in its hold down device, knew its limits and did not advise anyone of such limitations. (R.A. 231)

The trial court reached the wrong result therefore, the duty to warn Mr. Jacobson did exist and it was breached. Defendant's literature did not adequately state the limitation of 270 K strand when used as a hold down device". (by the court R.A.231)

- (2) The Defendant's duty to Mr. Jacobson required that the warning be given to Mr. Swenson, the designer.

The Restatement makes allowance for the possibility that the supplier may furnish the product through a "third person". In this case, the "third person" was United Prestress and its design technician, Mr. Swenson. It was Mr. Swenson to whom C.F. & I. should have directed its warning because he was the man who decided how much stress should be imposed on the hold down device. This is a part of the design of the beams on which Mr. Jacobson was working when he was killed. (Ex. 7b).

In the casting bed everything is done in terms of feet and inches; Mr. Jacobson and his crew stretched the strand a specified distance to develop the required tension. The measurements for each job are furnished to the workmen by the designer who, in his work, translates pounds of stress into terms of distance for the crew to stretch the strand.

C.F. & I. must alert the designer to the safe limits of the strand so he can incorporate the information into a safe design, translate it into terms of distance to stretch and thus pass it on to Mr. Jacobson. There is no other way to get the information to him and he must have it. He cannot work safely without it, because there is no way for him to know when he approaches the stress limit. The danger is great but subtle, it is undetectable until the steel starts to fly.

In comment 'n' the Restatement editors indicate that the duty to warn is often discharged by warning the "third person":

Thus, while it may be proper to permit a supplier to assume that one through whom he supplies a chattel which is only slightly dangerous will communicate the information given him to those who are to use it unless he knows that the other is careless, it may be improper to permit him to trust the conveyance of the necessary information of the actual character of a highly dangerous article to a third person of whose character he knows nothing. It may well be that he should take the risk that this information may not be communicated, unless he exercises reasonable care to ascertain the character of the third person, or unless from previous experience with him or from the excellence of his reputation the supplier has positive reason to believe that he is careful. In addition to this, if the danger involved in the ignorant use of a particular chattel is very great, it may be that the supplier does not exercise reasonable care in entrusting the communication of the necessary information even to a person whom he has good reason to believe to be careful.

The Montana case of Hopkins v. Ravalli County Electric Co-op., Inc., 144 Mont. 161, 395 Pac. 2d 106, is closely analagous. There the Montana Supreme Court found the co-op liable for failure to warn a neighbor that poison spray had been used on weeds, in an area where the co-op knew that the neighbor's cows were used to grazing. The court found that the co-op knew that the cows grazed in the area, knew that the spray was dangerous, and it could have warned. It was liable for neglect to issue the warning to the owner of the cows who, presumably, could have taken steps to see that the cows were not exposed to the danger. The same factors exist in this case. C.F. & I. had full knowledge of all the factors and could have warned Mr. Swenson to take steps to see that Mr. Jacobson and his crew were not exposed to this danger. Mr. Jacobson had no better chance of protecting himself

than did the cows. Warning the rancher would have saved the cows; warning Swenson would have saved Mr. Jacobson.

The trial court erred when it found no duty requiring C.F. & I. to warn Mr. Jacobson; C.F. & I.'s duty was to inform Mr. Jacobson through a warning directed to Mr. Swenson. For failure to do so C.F. & I. should be held liable.

(3) The finding of "insulation" is contrary to the Restatement rule which the trial court adopted.

Upon Mr. Young's assumed knowledge the court "insulated" C.F. & I. from liability with this explanation:

. . . there is no duty of a supplier of a chattel to foresee that the engineers and technicians will fail to follow warnings given or to employ knowledge possessed. (by the court, R.A. 233)

There was no warning to the technicians, nor any knowledge on their part, to support this assertion by the court. And it is contrary to the Restatement rule.

/One who supplies dangerous goods is liable if he

b. has no reason to believe /user will realize its dangerous condition, and

c. /he fails to take reasonable care to warn.

The meaning of the formal statement above is amplified

at comment k:

k. When warning of defects unnecessary. One who supplies a chattel to others to use for any purpose is under a duty to exercise reasonable care to inform them of its dangerous character in so far as it is known to him, or of facts which to his knowledge make it likely to be dangerous, if, but only if, he has no reason to expect that those for whose use the chattel is supplied will discover its condition and realize the danger involved. It is not necessary for the

supplier to inform those for whose use the chattel is supplied of a condition which a mere casual looking over will disclose, unless the circumstances under which the chattel is supplied are such as to make it likely that even so casual an inspection will not be made. However, the condition, although readily observable, may be one which only persons of special experience would realize to be dangerous. In such case, if the supplier, having such special experience, knows that the condition involves danger and has no reason to believe that those who use it will have such special experience as will enable them to perceive the danger, he is required to inform them of the risk of which he himself knows and which he has no reason to suppose that they will realize.

To rely upon knowledge of Mr. Jacobson or of the design technicians for insulation C.F. & I. must have "reason to believe" that they have the requisite knowledge. It is bound to warn of the dangers in 270 K as a hold down unless it has "reason to suppose that they will realize " the danger.

The record contains no evidence which could possibly justify a reasonable belief that Mr. Jacobson had the ability to recognize the danger limit for stress in the hold down. Likewise, the record shows no "reason to believe" that Mr. Swenson had such knowledge when he designed the beam. Mr. Swenson did not know. (P. 23, this brief). The words "reason to believe" imply a rational process; the formation of a belief based upon facts. There is no evidence in the record of any facts upon which C.F. & I. could rationally form a belief that warning was not required.

The evidence pertinent to the problem is all to the contrary.

C.F. & I. Bulletin PC 955, (E 1), speaks of 270 K as an

engineering break through." It speaks of such things as "minimum ultimate strength", 31,000 pounds; "breaking strength" 1,000 pounds; 15% stronger than ASTM grade; use six 270 K strands in place of seven of the ASTM.

Every adjective used in PC 955 is a superlative; e.g., important engineering break through; distinct advantages; rapidly growing wide acceptance; thorough testing; easy to handle; greater saving.

The bulletin says "This folder has been prepared to provide complete information on the physical properties of the strand." That immodest statement was intended to be relied upon and it was, by Mr. Swenson.

C.F. & I. knew before Mr. Jacobson was killed the method and practice of United Prestress in its hold down operations. The hold down procedure was no better before Mr. Jacobson was killed than it was when C.F. & I. criticized it at the trial. The information C.F. & I. had pointed to a necessity of warning; it did not support an assumption that warning was not required.

These factors were overlooked by the court, otherwise it could not rule that assumed knowledge of the wrong designer insulated C.F. & I. from a duty to see that Mr. Jacobson was given safe information in the measurements for stretching the strand. The Restatement, adopted by the court, was not followed to the result it clearly requires in this case.

- 4) If C.F. & I. relies upon the safety knowledge of the designer to justify not warning, it must accept the risk involved that he will not have such knowledge.

When the knowledge of the technician, Swenson, in this case, is relied upon by the supplier for accomplishment of the objective of putting the information in the hands of the workman there exists an inherent risk that the technician will be ignorant, that he will not in fact have the required technical knowledge. That risk existed in this case and unfortunately this case demonstrates that all technicians designing in prestress technology did not have the safety information required.

The risk inherent in reliance upon the knowledge of the technicians must be assigned to and borne by either the workman or the supplier. Almost by definition the workman cannot know the scope of the technician's competence - if he knew that much he would almost be a technician himself. The workman, if the risk is assigned to him, cannot appreciate it and he cannot protect himself. On the other hand, C.F. & I., the supplier, by virtue of its expertise and its staff of field representatives, did know the risk, appreciated its significance and could have taken effective action. One short sentence added to its technical brochure, Ex. 1, would have done the trick.

The risk involved should be assigned to the party who is in a position to control the situation. In this instance that party is the supplier, C.F. & I. The risk that Swenson was inadequately informed should be borne by C.F. & I. because it either elected to rely on such knowledge to get the safety information to Mr. Jacobson or else it neglected the whole problem.

It did not warn.

At comment 'n' the Restatement editors discuss the assignment of the risk inherent in trusting the third party. Their consideration is directed to the risk that warnings given will not be passed on to the workman. The same risk exists that knowledge possessed will not be passed on. The risk is assigned to the supplier.

...it may be proper to permit a supplier to assume that one through whom he supplies a chattel which is only slightly dangerous will communicate...it may be improper to permit him to trust the conveyance of the necessary information /about/ . . .a highly dangerous article to a third person of whose character /or technical knowledge/ he knows nothing. It may well be that he should take the risk that this information may not be communicated unless he exercises reasonable care to ascertain the character of the third person /or from knowing him or his reputation/ he has positive reason to believe that he is careful. . . .if the danger involved in the ignorant use of a particular chattel is very great, it may be that the supplier does not exercise reasonable care in entrusting the communication of the necessary information even to a person whom he has good reason to believe to be careful.

Reasonable care requires of C.F.& I. that it do one of two things. At a minimum it might publish a warning in its technical bulletin. Perhaps the warning should have been followed up but at least it should have been given. Alternately, C.F.& I. should have made it its business to know by inquiry how much knowledge the design technicians had. The gap in Swenson's knowledge would have been discovered and remedied. Because overstressed 270 K is so terribly dangerous, it may be reasonable to require all of these things. But, in any event, it is not reasonable to

excuse C.F. & I. from any duty at all as the trial court did.

Certainly the possible harm here involved compels C.F. & I. to make some effort toward safety. What C.F. & I. did was, at most, make a bare assumption of Swenson's competence. It may not have done even this much, it may have ignored the whole problem. This abrogates the duty, it permits C.F. & I. to supply a lethal product and do absolutely nothing about safety. This is improper if there is any merit in the duty to warn concept.

The trial court decision permits this material to be sold with utterly no attention paid to safety in its utilization. The Restatement rule is thus violated and stripped of any meaning at all.

(5) Under Section 388 Restatement, Torts, Second, C.F. & I. is liable for damages to the Jacobson family.

270 K is a highly dangerous product supplied by C.F. & I. through Mr. Swenson for actual use by Mr. Jacobson in the hold down. C.F. & I. knew this and knew that safety required a limit to the stress when it is so used. It did not advise either Mr. Jacobson or Mr. Swenson of this limitation; rather it published literature touting the 31,000 pound strength of the strand and claiming thorough testing in casting beds.

Had Mr. Swenson known or been warned of the limitations of the strand this tragedy could have been avoided. C.F. & I. did not warn; Swenson did not know and C.F. & I. must accept the risk that he might not know, it had no reason to believe that he did.

Properly applied, the Restatement rule holds C.F. & I. to answer for the damage suffered by the Jacobson family. It failed to warn when it knew warning was essential to safety.

C.F. & I. SHOULD HAVE BEEN HELD LIABLE FOR BREACH OF THE EXPRESS WARRANTIES STATED IN ITS BULLETIN AND ADMITTED IN THE PLEADINGS.

(1) Express warranties were stated and breached.

C.F. & I.'s sales Bulletin PC 955 introduced in evidence as Exhibit 1 warrants its 270 K strand to have a "minimum ultimate strength" of 31,000 pounds and a minimum "Breaking Strength" of 31,000 pounds. When the strand failed and killed DeRay Jacobson the load upon it was 22,600 to 23,250 pounds, the higher load conservatively assumes 100% friction at the holdup points and complete vertical deflection of the horizontal strands. Tr. 147. C.F. & I. introduced somewhat speculative evidence that the load may have been as high as 25,250 pounds (Tr. 440), which is still 5,750 pounds under the warranted strength. Thus under any view of the evidence the strand failed at less than 31,000 pounds. The trial court so found:

The court makes no finding as to the exact tension at which the hold down strands break except that the strands did fail at a tension of less than 31,000 pounds. (Emphasis added) R.A. 228.

C.F. & I. admitted by answer "that DeRay Jacobson was injured and that he died from injuries caused by the breaking of a hold down strand and the oscillation of the other strands. . ."

This establishes the liability of C.F. & I. to DeRay Jacobson's family for breach of expressed warranties and resulting death of their husband and father. Hanson V. Firestone Tire & Rubber Company, 276 F.2d, 254, 257 (1960):

In an action of the present character, the burden of proof resting upon the plaintiff entails merely demonstration that the goods did not have the properties warranted.

In the absence of the controverting evidence adduced by the defendant, which convinces the jury that the goods were as warranted, plaintiff should prevail. *Hertzler v. Mansham*, 228 Mich. 416, 200 N.W. 155. The plaintiff is not required to show the technical causation of the goods' failure to match their warranty. Nor is it necessary that the manufacturer's negligence be shown as the cause of such failure. 276 F. 2d at 258. (Emphasis added)

Randy Knitwear, Inc. v. American Cyanamid Company, Ct. App. N.Y. 1962, 181 N.E. 2d 399; *Bonker v. Ingersoll Products Corporation*, D. Mass. 1955, 132 F. Supp. 5; *Haman v. Diglioni*, Conn. 1961, 174 A.2d 294; *Baxter v. Ford Motor Company*, Wash. 1932, 12 P.2d 409; *Sentor v. B. F. Goodrich Co.*, 127 F. Supp. 705, 707-708.

The trial court ignored judicial admissions of express warranty in C.F. & I.'s answer (R.A. 48, L. 28-32; 49) and adopted an erroneous and strained construction of C.F. & I. sales literature (Ex. 1). The result is reflected in Finding of Fact XII and Conclusion of Law III wherein the trial court held C.F. & I. "did not warrant or represent that 270 K strand would withstand a tension of 31,000 pounds when used in a hold down device such as was employed by United Prestress at the time of the accident." (R.A. 232, 230). In view of the admissions of C.F. & I., the language of its sales bulletin (Ex. 1) and C.F. & I.'s knowledge of the United Prestress hold down system (R.A. 231) this was clearly error.

The Jacobson family is entitled to recover upon these expressed warranties admitted in C.F. & I.'s answer:

Defendant admits that Type 270 K prestressed concrete strand was and is expressly warranted by the defendant to have a minimum ultimate strength of 31,000 pounds



(and to be capable of safely sustaining such load or stress). Ex. 19. R.A. 48.

By amendment C.F. & I. withdrew from its answer that portion of the language quoted surrounded by parenthesis. Thus perhaps C.F. & I. withdrew from that class of admissions absolutely binding upon it its warranty of "safety" at a 31,000 pound load, but not the warranty of minimum strength. At any rate, the language removed was introduced in evidence in Ex. 19 as an admission against interest. Gardner v. Eclipse Grocery Co., 72 Mont. 540, 546; 234 Pac. 490 (1925); McDonald v. Peters, 128 Mont. 241, 272 P. 2d 730 (1954). No contradictory evidence was offered or received.

The admission that 270 K strand was and is expressly warranted by C.F. & I. to have a minimum ultimate strength of 31,000 pounds remains in the answer; it is sufficient to establish an expressed warranty by itself.

Independently of those admissions, bulletin PC 955, in evidence as Ex. 1 expressly warrants in the strongest language possible, 270 K strand to be capable of sustaining a load of at least 31,000 pounds when used in the manufacture of prestressed concrete objects as it was in this case. In Table 1 for 7/16 diameter strand, the bulletin warrants:

Breaking strength of Strand Min. lb. 31,000

Table 2 warrants Type 270 K strand (7/16) diameter to have a minimum ultimate strength of 31,000 pounds.

The C.F. & I. bulletin P C 955 (Ex. 1) further assures the

user that "extensive testing" has been carried out, proving its adaptability to use in "grips of the type employed in casting beds". C.F. & I.'s publication headed "SPECIFICATIONS AND PHYSICAL PROPERTIES", purports to be exhaustive, i.e.:

This folder has been prepared to provide complete information on the physical properties of the strand.

The strand which failed was a hold down strand, and in that connection the trial court found C.F. & I. "knew that its 270 K strand would be used for hold down devices although the strand was not furnished specifically for that use" and "the defendant knew that 270 K strand was employed under heavy tension in prestressing operations, and that strand failures are extremely hazardous". (Finding XIV. R.A. 231)

The strand that killed DeRay Jacobson being loaded only to 23,250 pounds or less did not display either a minimum "breaking strength" or "minimum ultimate strength" of 31,000 pounds giving either of those phrases their ordinary and reasonable meaning.

In the face of that evidence, the trial court focused attention solely on the phrase "minimum ultimate strength" and held that C.F. & I. did not expressly warrant 270 K would withstand a load of 31,000 pounds in the application which killed Jacobson, by reason of the following ambiguous language quoted by the court from a paragraph in Ex. 1:

/entitled DUCTILITY/



Thorough testing has been conducted using Type 270 K strand in wedge grips of the type employed in casting beds. Also, the strand was deflected around pins as it would be in a casting bed. Comparison of these test results with results of similar tests on ASTM Grade strand shows that the efficiency of Type 270 K strand under these conditions, measured as a percentage of its ultimate strength, is comparable to that of C.F. & I. - Roebling ASTM Grade strand. (Emphasis partially added by the court). (Ex. 1) (R.A. 230).

The trial court's construction of Ex. 1 and resulting failure to hold C.F. & I. liable for breach of warranty is erroneous for the reasons stated in the following arguments:

(2) The key word in the language quoted, the ambiguous "efficiency" cannot reasonably be equated with and given the same meaning as the clear positive assertions of minimum "Breaking Strength" contained in the literature.

To sustain the trial court one must give the phrase "minimum ultimate strength" a special and extraordinary meaning and view C.F. & I.'s paragraph on "DUCTILITY" as stating or intending to state by use of the word efficiency that its strand will break when used under tension at less than 31,000 pounds, or that it will break at the same load level as ASTM Grade strand. Neither construction is reasonable.

In the trial court, C.F. & I. devoted evidence and considerable argument to the proposition that the 270 K strand which failed met specification for ASTM Grade strand. Tr. 325, but see 329-331. It was urged that "minimum ultimate strength" had a special meaning and it was urged that all that is really required is that the strand meet ASTM Grade specifications. This may be what led the trial court into error.

In addition to furnishing specific load bearing capacity for 270 K strand, greater and different than that for ASTM Grade strand, C.F. & I.'s bulletin fairly shouts the greater strength of 270 K strand as compared to ASTM Grade strand and the advantages to be gained thereby. Among other items of information given are the following, not quoted above:

Type 270 K, 7-wire uncoated stress-relieved prestressed concrete strand, an important engineering break-through recently announced by C.F. & I. - Roebling, has approximately 15% greater strength than ASTM Grade strand. This quality together with its other inherent properties, imparts many distinct advantages to Type 270 K strand -- fewer strands to be handled, . . . a larger prestressing force can be placed in a member . . .

* * *

DESIGN LOAD

Six Type 270 K strands will replace seven ASTM Grade strands of the same diameter.

* * *

COST COMPARISON

Under Design Load it was shown that six Type 270 K will replace seven ASTM Grade strands so we can use 12 Type 270 K in place of 14 ASTM Grade strands.

Additionally in the SPECIFICATION paragraph the bulletin states:

Type 270 K strand shall be fabricated and tested in accordance with the requirements of ASTM Designation A416-59T with the exceptions shown in Table #1 opposite. (Emphasis added)

Table #1 states in clear and unequivocal language that 270 K 7/16 diameter strand has a "Breaking Strength" of strand Min. lb. 31,000. This leaves no doubt but that Type 270 K strand is warranted to have greater strength and specifically a minimum

breaking strength of 31,000 pounds when utilized in the prestress manufacturing process.

Turning to the actual language upon which C.F. & I. was permitted to escape liability, it actually refers to performance (efficiency) of Type 270 K strand in a completed product.

"Ductility" as the word itself connotes, refers to the flexibility and capability of the strand to be pulled or fashioned into new form. To the engineer it refers to the elastic action range of the strand essential to optimum performance from the material as part of a completed concrete structure. (Tr. 140-143). The sense of the DUCTILITY paragraph is that 270 K strand will have the desired elastic action essential to good performance in a completed concrete structure when it is stressed to a high percentage of its minimum load bearing strength. This is also a characteristic of ASTM Grade strand and therefore the reason for the comparison.

The elastic action of the strand can be crudely compared to that of a rubber band. The strand reaches a point under tension when it will not spring back to its original form. (Tr. 340-344). It is this point to which the paragraph on DUCTILITY obviously refers. The trial court erred in equating this with the warranted load carrying capacity and breaking point of the strand.

It is inconceivable that C.F. & I. intended to make a statement of lesser strength in the "DUCTILITY" paragraph when



no specific strength figure is set forth and nothing is said with respect thereto in the "DESIGN LOAD" and "SPECIFICATION" portions of the literature. It is the DESIGN LOAD and the SPECIFICATION portions of the bulletin which refer us to Table 1 and Table 2 containing the statements: "Breaking Strength of Strand Min. lb. 31,000" and "Minimum Ultimate Strength 31,000#". Those paragraphs are the portions of the bulletin which have to do with the load bearing strength of the strand. On the basis of the relevant portions of the literature Mr. Swenson, who calculated and designed the forces to be imposed on the C.F. & I. strand rightly believed that language and took C.F. & I. at its word. He testified:

A. The ultimate capacity of the strand is the maximum load we can put on the strand before failure.

Q. And that's 31,000 pounds?

A. 31,000 minimum, correct.

(Tr. 82)

Assuming arguendo that the phrase "minimum ultimate strength" has a special meaning by reason of the reference to efficiency in the DUCTILITY paragraph of the bulletin, there can be no doubt as to the meaning of the other phrase: not

"Breaking Strength Min. lb. 31,000."

Webster defines:

BREAKING STRENGTH or BREAKING STRESS -- the greatest stress esp. in tension that a material is capable of withstanding without rupture.

He defines "BREAK" as "to separate into parts with suddenness or

violence" "rupture" "penetrate , pierce" "to exhaust in . . . strength or capacity" "to come apart or split into pieces". Webster's Third New International Dictionary-Unabridged, a Merriam-Webster.

In this day and age when clearly expressed disclaimers are construed away or held invalid by the courts, C.F. & I. cannot avoid the effect of its strong, clear, positive language of the 31,000 pound breaking strength of its product on the basis of a word as ambiguous as "efficiency"! (see Fairbanks Morse & Co. v. Consolidated Fisheries Co., 3 Cir. 190 F.2d 817; Berk v. Gordon Johnson Company, ED Mich. 1964, 232 F. Supp. 682, 686-687; Henningson v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69, 75 ALR 2d 1, 14, 22 (1960).

The rule of construction which the trial court should have applied is stated in Lane v. C. A. Swanson & Sons, (Cal. App. 1955) 278 P. 2d 723, 726. There the court stated:

The tendency of the modern cases is to construe liberally in favor of the buyer language used by the seller in making affirmations respecting the quality of his goods and to enlarge the responsibility of the seller to construe every affirmation by him to be a warranty when such construction is at all reasonable.

Lane v. C. A. Swanson & Sons is analagous to the instant case. There plaintiff was injured by a bone fragment from defendant's can of "boned chicken". That language appeared on the label and the defendant had also advertised that its chicken contained "no bones". The defendant urged that the term "boned chicken"



was merely descriptive of the manner in which the product was prepared and packaged and that it did not constitute a warranty that the contents of the can were wholly free of bones. In response to that argument the court said:

And with respect to the theories of the defendants it may be asked how many bone fragments would be permissible without contradicting the representation that there were no bones. Defendants argue that it is impossible to extract the bones of a defunct chicken without leaving in the remains small slivers or pieces of bones. . . .

Plaintiff testified that his understanding at the time he purchased the 'Boned Chicken' was 'just what the reading on the label implied, chicken without bones.'

Our conclusion is that the label on the can, coupled with representation in the newspaper ads that the contents contained no bones, constituted an express warranty and that the same was breached. If there could be a doubt as to the meaning of "boned chicken", it was removed by the statement that it contained no bones. 278 P. 2d at 726. (Emphasis added)

We invite the court's attention to the underlined portions of the language quoted above which is particularly applicable to the facts of this case. Here as in Lane the defendant urged that minimum ultimate strength had a meaning other than that which those words would normally be given. The trial court agreed and focused attention solely on that phrase, ignoring the even stronger phrase, minimum "Breaking Strength of Strand". In Lane the defendants argued the impossibility of extracting all the bones from a defunct chicken while here the evidence left no doubt that 270 K prestressed strand will hardly ever hold 31,000 pounds in normal usage. (Ex. 11, p. 15 Tr. 463, Tr. 325, Tr. 435)

Here Mr. Swenson testified that his understanding was just what the literature stated, that the minimum ultimate strength of the strand "is the maximum load we can put on the strand before failure."

Q. And that's 31,000 pounds?

A. 31,000 minimum, correct.

The last paragraph quoted from Lane v. C. A. Swanson & Sons, supra can be applied to that portion of C.F. & I.'s bulletin ignored by the trial court, viz.,

If there can be a doubt as to the meaning of . . .
/minimum ultimate strength/ it was removed by the
statement that it /had a Breaking Strength of Strand
Min. lb. 31,000/ . . .

It is the position of the Jacobson family that if there is doubt (and the trial court expressed doubt, R.A. 230) as to the meaning of the phrase "minimum ultimate strength" and the word "efficiency", C.F. & I. removed the doubt by its unequivocal statement that its strand had a minimum Breaking Strength of 31,000 pounds. The trial court erred not only in construction of the phrase "minimum ultimate strength" but in focusing attention solely on that phrase to the exclusion of the even stronger language stating C.F. & I.'s warranty of a 31,000 pound minimum breaking strength.

Construction of Ex. 1 in its entirety leads to the inescapable conclusion that C.F. & I. expressly warranted its product to have a minimum breaking strength of 31,000 pounds without diminution by reason of normal conditions existing when the



strand is used in the manufacture of prestressed concrete objects. The law does not permit the trial court to construe the language of Ex. 1 strictly against the Jacobson family, but requires the language used by C.F. & I. to be construed liberally in their favor and strictly against C.F. & I. Lane v. C. A. Swanson & Sons, supra; Fairbanks, Morse & Co. v. Consolidated Fisheries Co., supra, 190 F. 2d 817; cf. Henningson v. Bloomfield Motors, supra, 32 N.J. 358, 161 A. 2d 69, 75 ALR 2d 1.

(3) The courts will not give effect to derogation or even disclaimer of a warranty expressed in other portions of the literature, but will give the expression of warranty controlling effect.

Given the trial court's construction, the language of the DUCTILITY paragraph derogates from the warranties clearly expressed elsewhere in the publication. That ambiguous language is not clear enough to be termed a disclaimer, yet even a clearly expressed disclaimer will not be given effect by the courts to impair a warranty expressed in the document.

In Fairbanks Morse & Co. v. Consolidated Fisheries Co., supra, the court of appeals for the 3 circuit made a statement which is applicable here:

Even if the warranty in the Specification be considered express, the district court deemed it to be ineffective because of the disclaimer provisions. If we were convinced that the express warranties contained in the Specification were completely contradicted by the disclaimer clauses, we would have no doubt in resolving the conflict by holding that the former must prevail. Every reasonable rule of construction points in that direction. The rule that a contract is construed strictly against the draftsman would lead us to resolve our doubts in favor of the buyer. (Emphasis added). 190 F.2d at 822.

That being the rule in the case of a clearly expressed disclaimer a fortiori, language which is not ambiguous and not plainly contrary to the warranties stated cannot be given effect.

We invite the court's attention also to the language in Berk v. Gordon Johnson Company, E.D.Mich.1964, 232 F.Supp.682, at 686 and 687 wherein the court stated:

Assuming for purposes of the motion that the drawing is part of the contract, and that the words 'Kosher operation' on the drawing are an express warranty of fitness, the court must resolve the inconsistent clauses in the contract against the disclaimer of warranty if the

* * *

No cases appear to hold that an express warranty in a contract is cancelled by an express disclaimer of warranty in the same contract. Indeed, Differential Steel Car Co. v. McDonald (Ca 6, 1950, 180 F.2d 260, suggests otherwise).
Emphasis added.

The court went on in Berk to apply rules of contract construction favoring plaintiff to resolve the conflict, including:

Finally, to the extent that a contract is susceptible of two constructions by reason of doubt as to the meaning of ambiguous language, it is to be construed most strongly against the party by whom the ambiguous language is used. 232 F.Supp. at 687.
(Emphasis added).

That is also a rule of construction in Montana. Voyta v. Clonts, 134 Mont. 156, 166, 328 P.2d 655, 661 (1958); United States Bldg. & Loan Ass'n. v. Gardiner, 87 Mont. 586, 591, 289 Pac. 555 (1930); cf. Section 13-720, Revised Codes of Montana, 1947.

See also the landmark decision of Henningson v. Bloomfield Motors, supra, 32 N.J.358, 161 A2d 69, 75 ALR2d 1:

As to disclaimers or limitations of the obligations that normally attend a sale, it seems sufficient at this juncture to say they are not favored, and that they are strictly construed against the seller. 75 ALR2d at 14.

C.F. & I. prepared and distributed PC 955 (Ex.1) knowing that its 270 K strand would be used for hold down devices and employed under heavy tension in prestressing operations. (R.A. 231). C.F. & I. knew also that it could only be so used by employment of standard wedge grips and referred to them in its literature. It is in that context that C.F. & I. purported to "provide complete information on the physical properties of

the strand and warranted it to be capable of bearing a load of 31,000 pounds in the strongest and most unequivocal language possible, i.e., minimum Breaking Strength of Strand--31,000 pounds. It must now be held liable for the consequences of the failure of its product to measure up to that statement. The result required is set forth in Hannsz v. MacWhyte Co., 3 Cir. 1946, 155 F.2d 445 involving wire rope. There a manual issued by the manufacturer contained tables of "approximate breaking strength", language even weaker than the "minimum breaking strength" warranted by C.F. & I. The court made the following statement:

The representations of the manual as to the tensile strength of the wire rope of the size purchased by King were binding on MacWhyte. If King was killed and Ellis was injured because the wire rope broke, having been subjected to less strain than that set forth in the table of tensile strengths, the plaintiffs would be entitled to recover by way of breach of express warranty provided the wire rope was used by King for a purpose intended by MacWhyte. (Emphasis added).
155 F.2d at 46.

C.F. & I. admitted an express warranty of 31,000 pounds.

In the face of the language of its literature, the warranty could hardly have been denied. The C.F. & I. strand broke "having been subjected to less strain than that set forth in the table of minimum ultimate and Breaking Strength of Strand7. . . ." The Jacobson family is entitled to recover for breach of an express warranty. Hanson v. Firestone Tire & Rubber Company, 276 F.2d, 254, 257 (1960).

THE TRIAL COURT ERRED IN FAILING TO IMPOSE LIABILITY UPON C.F. & I. FOR BREACH OF IMPLIED WARRANTY AND UNDER THE DOCTRINE OF STRICT LIABILITY AND TORT.

The same evidence which entitles the Jacobson family to recover from C.F. & I. for breach of express warranty, also entitles them to recover under an independent, though related theory of breach of implied warranty and strict liability in tort.

Independent of contract or statute, the weight of modern authority implies warranties that C.F. & I.'s prestressed concrete strand was and is reasonably suitable for use as such and is of merchantable quality. Those implied warranties were breached by the failure of C.F. & I. 270 K strand during the prestressing operation. See Henningson v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A2d 69, 75 ALR 1, 20; Dagley v. Armstrong Rubber Company, 7 Cir. 1965, 344 F.2d 245; B. F. Goodrich Co. v. Hammond, 216 F.2d 501, 504 (1959);

These implied warranties have been recognized with respect to all types of products. See Chairaluce v. Stanley Warner Management Corp., 236 F.Supp. 385 (1964); Nichols v. Nold, 174 Ka. 613, 258 P.2d 317; Hart v. Goodyear Tire & Rubber Company, 214 F.Supp. 817 (1963); Jakubowski v. Minnesota Min. & Mfg., 193 A2d 275 (1963). These and other authorities were reviewed in more detail in plaintiffs' post trial brief reproduced in the record. R.A. 139-142

The Jacobson family is also entitled to recover under the related doctrine of strict liability in tort as stated by the American Law Institute in Section 402 A, Restatement Torts, Second.

That provision is as follows:

§402 A. Special Liability of Seller of Product
for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The crux of that statement is that one who sells any product in a defective condition unreasonably dangerous to the user or consumer is liable for physical harm thereby caused to the ultimate user or consumer. The Jacobson family submits that Type 270 K prestressed concrete strand of the 31,000 pound minimum breaking strength grade is defective if it will not in fact withstand that tension. The evidence proved that it would not. Tr. 147

A full discussion of modern authorities construing and applying the doctrine of strict liability in tort is set forth in plaintiffs' post trial brief in the record on appeal. We

invite the court's attention to that statement without prolonging this brief by repeating it here. See R.A.143-146.

The trial court erred in failing to recognize that C.F. & I. breached the duties imposed upon it by law under the doctrines of implied (tort) warranties and strict liability in tort.

: THE DENIAL OF PLAINTIFFS' MOTION FOR NEW TRIAL WAS AN ABUSE OF DISCRETION.

After receiving the original findings of fact and conclusions of law of the trial court, the plaintiffs moved for a new trial or in the alternative a reopening of the evidence to permit proof on the insulation of C.F. & I. by virtue of the assumed knowledge of Mr. Young. The motion was supported by the affidavits of Mr. Young and his supervisor at United Prestress, Inc., Mr. Pappin. The affidavits go to the knowledge of Mr. Young, his lack thereof and his lack of participation with or right of supervision over Mr. Swenson. They corroborate the fact, already clear in the record, that Albert Young had absolutely nothing to do with DeRay Jacobson's death.

No part of the "insulation" theory had been tried, briefed or argued by the parties prior to the initial decision. Plaintiffs felt that this might account for the error into which the trial court fell. At that stage, with little effort because there was no jury, the unjust result caused by unwarranted confusion of Albert Young with the role played by Floyd Swenson could have been set right.

The trial court denied the motion and refused further evidence in a short opinion stating "It was not the design of the member, but rather the design and use of the hold down device which caused the trouble". This, as we have previously pointed out in this brief, was contrary to the evidence showing that

Swenson did indeed calculate and design the hold down force in the context of his close familiarity with the hold down device. He would not have designed the lethal load had C.F. & I. furnished a proper warning in its literature. But aside from that error, the trial court's order furnished no answer to the errors pointed out in the motion for new trial.

First the trial court held C.F. & I. "insulated" by the assumed knowledge of Mr. Young as to the size or number of hold down strands necessary. When we pointed out that he did not have such knowledge, and if he had, it would not have helped because Mr. Young was not involved in the decision of the force to be imposed on the hold down, the trial court went to the design of the hold down hardware itself. But there was nothing unique about it. Tr. 428. It was simply a method of tensioning strand utilizing standard wedge grips referred to in the C.F. & I. literature. Mr. Swenson was very familiar with it. This hardware and the manner in which it was employed was among the many constant factors which Mr. Swenson considered in every design he turned out. He knew how it operated, that it imposed the force on to a single strand of 270 K, and he assumed that it would sustain a 31,000 pound load based on the data published by the defendant. C.F. & I. also knew the United Prestress system.

When and by whom the hold down hardware was designed

therefore just is not important to the case. It was a factor that all parties were aware of before the day Mr. Jacobson died. There is no justification for imposing its shortcomings, if any, exclusively upon the plaintiffs. They, at least, are not the designers of the equipment nor was DeRay Jacobson. Mr. Swenson in doing his work in calculating the force in the hold down necessarily assumed the existing equipment just as he assumed the existing casting bed, forms, concrete and strand. If the hold down was ill designed to use with 270 K strand, or if 270 K strand should not have been used as a hold down without additional safety precautions, C.F. & I., knowing about these things, should have said so.

In addition to the design of the hold down device, the trial court indicated that its "use" was a part of the cause of the trouble. DeRay Jacobson certainly used the device in the physical sense but he did not decide where, how, or to what depth of depression he was going to use it. He did not determine the tension he was going to achieve from use of the hold down. These things were determined by Floyd Swenson and in this sense, Swenson was the "user". Again therefore any knowledge Albert Young may have had was unimportant and remained unconnected with DeRay Jacobson's death.

All DeRay Jacobson did was furnish the hands which were guided by Floyd Swenson. Floyd Swenson determined the position of the hold down and the extent of the load it would have to

withstand guided by the literature of C.F. & I. The patent exaggerations and gross inadequacies of that literature brought about the tragedy.

Accordingly the trial court's reasons do not justify its denial of the post trial motion. Inasmuch as the issues upon which the case was decided were not tried, argued, or briefed and in view of the obvious lack of support, both in law and in fact, for the result reached, the denial of the plaintiffs' motion was an abuse of discretion.

For the same reasons set forth in this brief directed to the reversal of the trial court's judgment, if this court does not direct the entry of judgment for the plaintiffs the case should be remanded for a new trial on all or part of the issues.

CONCLUSION

On the theory of negligence the trial court's Finding of Fact XIV compels entry of judgment for the Appellants. The negligent misrepresentation contained in C.F. & I's Bulletin PC 955 and its failure to give adequate or any warning of the limitations of 270 K strand when used as a hold down strand as defendant knew it would be, struck down DeRay Jacobson in the prime of life. His family has suffered manifest injustice on the basis of knowledge ascribed to an engineer totally unconnected with his death. Montana law imposes joint and several, if not sole, responsibility for that death on C.F. & I.

Under any view of the facts the trial court's interpretation of Section 388 of the Restatement of Torts, Second, abrogates the very duty to warn therein stated. Under the Restatement C.F. & I. owed a duty to warn DeRay Jacobson through Floyd Swenson of the hazards of using the strand as a hold down at loads within its specified strength which C.F. & I. later admitted were not safe. Having supplied misleading information couched in strongest possible language and with knowledge of the technique utilized at United Prestress to employ the strand, C. F. & I. chose not to deliver a warning. As it had ample reasons to realize, United Prestress, Swenson and Jacobson were unaware of the dangers involved at the loads 270 K strand was regularly being used as a hold down, subdivision (b) of Section 388 of the Restatement was satisfied. Thus C.F. & I. is liable under

Section 388 independently of Montana law applicable to the case.


C.F. & I. must also be held liable on the theory of breach of warranty. The breach is established by the evidence and trial court's finding of strand failure at less than 31,000 pounds, the "minimum ultimate strength" and "Breaking Strength of Strand" in minimum pounds warranted by the C.F. & I. sales literature. The warranties could not have been stated in stronger language. The trial court's construction of the literature cannot be reconciled with that language, the organization of the literature, or its plainly expressed meaning; and it is not consistent with the rules of construction the court was bound to follow.

If there can be any doubt as to the meaning of "minimum ultimate strength" C.F. & I. removed it by stating "Breaking Strength of Strand Min.Lbs. 31,000". C.F. & I. cannot now urge it meant something other than what it said at the expense of the family of the man those words killed.

Judgment should be reversed with instructions to the district court to determine damages and enter judgment for plaintiffs.

RESPECTFULLY SUBMITTED this 19th day of December, 1967.




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CERTIFICATE

We certify that, in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.


Attorney

Attorney

CERTIFICATE OF SERVICE

I certify that on this 19th day of December, 1967, I served three (3) copies of the within and foregoing brief of Appellants upon Joseph R. Marra, Esq., Attorney for Colorado Fuel and Iron Corporation, a corporation, Appellee, by delivering them to him personally at his office in Great Falls, Montana.


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